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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 JEFFREY NOEM VETA,

9 Petitioner,

10 vs.

11 CHUCK RYAN, et al.,

12 Respondents.

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) No. CV 05-336-TUC-CKJ
)
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ORDER

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14 Pending before the Court is Petitioner's Petition for Writ of Habeas Corpus by a
15 Person in State Custody Pursuant to 28 U.S.C. § 2254. Respondents have filed an
16 Answer and Petitioner has filed a Reply.

17 *Factual and Procedural Background*

18 In April, 1996, Petitioner Jeffrey Noem Veta ("Veta") was indicted on thirteen
19 counts including seven counts of sexual conduct with a minor.

20 Veta was extradited from Kentucky and arrived in Arizona on February 20, 2002.
21 During an April, 2002, pre-trial conference, Veta's counsel, Larry Rosenthal
22 ("Rosenthal") indicated that Veta did not want to waive any speedy trial rights. However,
23 counsel suggested a trial date in the first or second week of July. Trial was scheduled for
24 July 9, 2002, which was beyond the speedy trial requirements of Ariz.R.Crim.P. 8.3(a)
25 and the Interstate Agreement on Detainers ("IAD"), A.R.S. § 31-481.

26 On June 19, 2002, Veta filed a pro se motion to dismiss pursuant to Rule 8.3(a) and
27 8.6, Ariz.R.Crim.P. On June 20, 2002, Veta filed a pro se motion to dismiss pursuant to
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1 the IAD. The trial court denied the motion, stating that counsel's explicit agreement to
2 the trial date constituted a waiver or abandonment of Veta's rights under the IAD. Veta
3 filed a petition for writ of habeas corpus with the Supreme Court of Arizona; that action
4 was dismissed with instructions to file a petition for special action. Veta then petitioned
5 for special action to the Court of Appeals of Arizona. The appellate court declined to
6 accept jurisdiction. The Supreme Court of Arizona denied Veta's Petition for Review.

7 Veta also filed a state habeas corpus petition. The trial court denied relief and Veta
8 appealed to the Court of Appeals of Arizona. The appellate court affirmed the trial court.
9 The Supreme Court of Arizona denied Veta's Petition for Review.

10 Trial commenced on April 20, 2004. On May 3, 2004, Veta was found guilty of
11 continuous child abuse, involving a minor in a drug offense, and two counts of sexual
12 conduct with a minor under 15. Veta was found not guilty of furnishing obscene or
13 harmful items to a minor and no verdicts were reached on three counts of sexual conduct
14 with a minor under fifteen. On July 15, 2004, Veta was sentenced to consecutive,
15 presumptive 20 year terms of imprisonment on Counts 1, 2, 4, and 5. Veta filed a timely
16 notice of appeal of the judgment and sentence.

17 On August 20, 2004, Veta filed a Notice of Post-Conviction Relief and, on June
18 14, 2005, filed a Petition for Post-Conviction Relief raising claims of ineffective
19 assistance of counsel for failing to assert Veta's speedy trial rights under the IAD and an
20 illegal sentence pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159
21 L.Ed.2d 403 (2004). On October 21, 2005, the post-conviction court denied relief. On
22 September 26, 2007, the Court of Appeals granted review but denied relief. Veta did not
23 petition for further review and, on October 23, 2007, the Court of Appeals reinstated
24 Veta's direct appeal.

25 On appeal, Veta asserted (1) the trial court erred in finding that defense counsel
26 had waived Veta's speedy trial rights under article IV of the IAD; (2) he was not bound
27 by counsel's agreement to a trial date outside the IAD time limit; (3) the trial court erred
28 in failing to follow the procedure set out in the IAD, art. IV(c); (4) the State breached its

1 duty to see that the trial court complied with the IAD time limits; (5) the State
2 “interfered” with defense counsel’s conduct of the defense and violated Veta’s right to
3 counsel; (6) the trial court erred by giving a jury instruction on the definition of
4 “hiding” because it was unsupported by the evidence; and (7) the trial court illegally
5 enhanced his sentences when he allegedly received no notice of any dangerous crimes
6 against children (DCAC) enhancement in the amended indictment. *See Answer, Ex. I.*

7 On June 30, 2008, the Arizona Court of Appeals affirmed Veta’s convictions and
8 sentences in a memorandum decision. On July 31, 2008, the Court of Appeals granted
9 in part Veta’s motion for reconsideration and corrected its June 30, 2008, decision.
10 Review was denied by the Supreme Court of Arizona and the United States Supreme
11 Court.

12 Meanwhile, on May 5, 2005, Veta filed a Petition for Writ of Habeas Corpus by
13 a Person in State Custody Pursuant to 28 U.S.C. § 2254. Following a stay to complete
14 the state proceedings, Veta filed an Amended Petition under 28 U.S.C. § 2254 for a Writ
15 of Habeas Corpus by a Person in State Custody. Veta has presented four claims for relief:

16 1. Veta’s Fourteenth Amendment Due Process liberty interest right was
17 violated when Arizona failed to release him after time limits of Ariz.R.Crim.P. 8.3(a) and
18 the IAD were exceeded. Veta states this claim in his Traverse as the trial court failed to
19 release him after an objectively unreasonable determination of waiver.

20 2. Veta’s Sixth and Fourteenth Amendment rights to effective assistance of
21 counsel was violated when Rosenthal, despite his agreement with Veta not to waive any
22 of his speedy trial rights and invoking those rights, proposed a time frame outside Veta’s
23 time limits, effectively waiving Veta’s speedy trial rights. In his Traverse, Veta asserts
24 that counsel’s conduct effected a waiver and lost Veta his right to dismissal of all charges
25 with prejudice.

26 3. Veta’s Sixth Amendment Fair Trial protection and Fourteenth Amendment
27 Due Process right was violated when, over defense objection, the trial court gave a
28 “hiding” instruction unsupported by the evidence and denied Veta a new trial, contrary

1 to *State v. Noleen* and *Hicks v. Oklahoma*.

2 4. Veta's Sixth and Fourteenth Amendment rights to Notice and Due Process
3 were violated when he was sentenced under A.R.S. § 13-604.01 after receiving no notice
4 of "DCAC" enhancement prior to trial in his Amended Indictment, contrary to *State v.*
5 *Waggoner* and *Hicks v. Oklahoma*.

6 An Answer and Traverse have been filed.

7
8 *Statute of Limitations*

9 This Court must review claims consistent with the provisions of the Antiterrorism
10 and Effective Death Penalty Act of 1996 ("AEDPA"). Under the AEDPA, a state prisoner
11 must generally file a petition for writ of habeas corpus within one year from the latest of:

- 12 (A) the date on which the judgment became final by the conclusion of direct
13 review or the expiration of the time for seeking such review;
14 (B) the date on which the impediment to filing an application created by State
15 action in violation of the Constitution or laws of the United States is removed, if
16 the applicant was prevented from filing by such State action;
17 (C) the date on which the constitutional right asserted was initially recognized by
18 the Supreme Court, if the right has been newly recognized by the Supreme Court
19 and made retroactively applicable to cases on collateral review; or
20 (D) the date on which the factual predicate of the claim or claims presented could
21 have been discovered through the exercise of due diligence.

22 28 U.S.C. § 2244(d)(1); *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005). The Court
23 has previously determined that Veta's Petition timely filed.

24
25 *Standard of Review*

26 Federal courts may consider a state prisoner's petition for habeas relief only on the
27 grounds that the prisoner's confinement violates the Constitution, laws, or treaties of the
28 United States. *See Reed v. Farley*, 512 U.S. 339, 347, 114 S.Ct. 2291, 2296, 129 L.Ed.2d
29 271 (1994). Indeed, a habeas corpus petition by a person in state custody:

shall not be granted with respect to any claim that was adjudicated on the merits
in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable
application of, clearly established Federal law, as determined by the
Supreme Court of the United States; or

1 (2) resulted in a decision that was based on an unreasonable determination
2 of the facts in light of the evidence presented in the State court proceeding.
3 28 U.S.C. § 2254(d); *see also Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495,
4 1523, 146 L.Ed.2d 389 (2000). General improprieties occurring in state proceedings are
5 cognizable only if they resulted in fundamental unfairness and consequently violated a
6 petitioner's Fourteenth Amendment right to due process. *See generally, Estelle v.*
7 *McGuire*, 502 U.S. 62, 67-68, 112 S.Ct. 475, 479, 116 L.Ed.2d 385 (1991).

8 This Court must review claims consistent with the provisions of the AEDPA.
9 "The Act limits the ability of federal courts to reexamine questions of law and mixed
10 questions of law and fact." *Jeffries v. Wood*, 114 F.3d 1484, 1498 (9th Cir. 1997).
11 Indeed, the AEDPA creates "an independent, high standard to meet before a federal court
12 may issue a writ of habeas corpus to set aside state-court rulings." *Uttecht v. Brown*, 551
13 U.S. 1, 127 S.Ct. 2218, 2224, 167 L.Ed.2d 1014 (2007), *citations omitted*. This Court
14 may only overturn a state court finding if a petitioner shows by clear and convincing
15 evidence that the finding was erroneous. *See* 28 U.S.C. § 2254(e)(1). An "unreasonable
16 application of clearly established law" exists if the state court identified the correct
17 governing legal principle from Supreme Court decisions but unreasonably applied that
18 principle to the facts of the case. *See Taylor*.

19 *Exhaustion of State Remedies*

20 Before a federal court may review a petitioner's claims on the merits, a petitioner
21 must exhaust his state remedies, i.e., have presented in state court every claim raised in
22 the federal habeas petition. *See Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct.
23 2546, 115 L.Ed.2d 640 (1991); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct.
24 1728, 1732, 144 L.Ed.2d 1 (1999) (a state prisoner in a federal habeas action must
25 exhaust his claims in the state courts "by invoking one complete round of the State's
26 established appellate review process" before he may submit those claims in a federal
27 habeas petition); *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999). Exhaustion
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1 of state remedies is required in order to give the "State the opportunity to pass upon and
2 correct alleged violations of its prisoners' federal rights . . . To provide the State with the
3 necessary opportunity, the prisoner must fairly present his claim in each appropriate state
4 court . . . thereby alerting that court to the federal nature of the claim." *Baldwin v. Reese*,
5 541 U.S. 27, 29, 124 S.Ct. 1347, 1349, 158 L.Ed.2d 64 (2004), *internal quotation marks*
6 *and citations omitted*.

7 In Arizona, exhaustion is satisfied if a claim is presented to the Arizona Court of
8 Appeals. A discretionary petition for review to the Supreme Court of Arizona is not
9 necessary for purposes of federal exhaustion. *Swoopes*, 196 F.3d at 1010; *State v.*
10 *Sandon*, 161 Ariz. 157, 777 P.2d 220 (1989) (in non-capital cases, state remedies are
11 exhausted by review by the court of appeals). A claim is "fairly presented" if the
12 petitioner has described the operative facts and legal theories on which his claim is based.
13 *Anderson v. Harless*, 459 U.S. 4, 6, 103 S.Ct. 276, 74 L.Ed.2d 3 (1982); *Picard v.*
14 *Connor*, 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971). In state court, the
15 petitioner must describe not only the operative facts but also the asserted constitutional
16 principle. The United States Supreme Court has stated:

17 If state courts are to be given the opportunity to correct alleged violations of
18 prisoners' federal rights, they must surely be alerted to the fact that the prisoners
19 are asserting claims under the United States Constitution. If a habeas petitioner
wishes to claim that an evidentiary ruling at a state court trial denied him the due
process of law guaranteed by the Fourteenth Amendment, he must say so, not only
in federal court, but in state court.

20 *Duncan v. Henry*, 513 U.S. 364, 365-66, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995).

21 Respondents acknowledge that each ground raised by Veta in his habeas petition
22 was previously presented to the state court in Veta's direct appeal or his petition for PCR,
23 and again in his petitions for review to the state appellate court. Respondents further
24 acknowledge that Veta asserted a federal law basis for each claim in state court. The
25 Court finds, therefore, that Veta has exhausted his state court remedies.
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1 *Speedy Trial Limits and the IAD*

2 Veta asserts that his Fourteenth Amendment Due Process liberty interest protection
3 was violated when the State of Arizona failed to release him after the speedy trial limits
4 of Ariz.R.Crim.P. 8.3(a) and art. IV(c) of the IAD were exceeded. Indeed, Veta asserts
5 that his due process rights were violated when, after an objectively unreasonable
6 determination of waiver, the trial court failed to release him.

7 The IAD is a compact entered into by forty-eight states, the District of Columbia,
8 and the federal government to establish procedures for resolution of one jurisdiction's
9 outstanding criminal charges against another jurisdiction's prisoner. *See New York v.*
10 *Hill*, 528 U.S. 110, 111, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000). Insofar as it is “‘a
11 congressionally sanctioned interstate compact’ within the Compact Clause of the United
12 States Constitution, Art I, § 10, cl. 3, the IAD is a federal law subject to federal
13 construction.” *Id.*, quoting *Carchman v. Nash*, 473 U.S. 716, 719, 105 S.Ct. 3401, 87
14 L.Ed.2d 516 (1985). Federal habeas review of IAD violations is limited, however, to
15 errors constituting “a fundamental defect which inherently results in a complete
16 miscarriage of justice [or] an omission inconsistent with the rudimentary demands of fair
17 procedure.” *Reed v. Farley*, 512 U.S. 339, 348, 114 S.Ct. 2291, 129 L.Ed.2d 277 (1994),
18 quoting *Hill v. United States*, 368 U.S. 424, 428, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962));
19 accord *Cross v. Cunningham*, 87 F.3d 586, 587-88 (1st Cir.1996); see also *Hitchcock v.*
20 *United States*, 580 F.2d 964, 966 (1978) (to state a violation of the IAD cognizable in §
21 2254 or § 2255 habeas proceedings, the alleged violation must rise to the level of a
22 “fundamental defect” or have “prejudiced” the rights of the defendant).

23 There is nothing in the record to suggests that the alleged IAD violation constituted
24 a “fundamental defect” or resulted in a “complete miscarriage of justice.” Veta does not
25 assert that the alleged IAD violation denied him the opportunity to secure a fair trial,
26 actually impaired his ability to prepare and present a defense, or to prosecute his appeal.
27 Rather, Veta asserts that his speedy trial rights were violated because he was not tried in
28 accordance with the deadlines of the IAD. Absent allegations of prejudice, however, his

1 claims are not cognizable under federal habeas review. *See e.g., Reed v. Farley*, 512
2 U.S. at 342 (holding that “a state court's failure to observe the 120-day rule of IAD
3 Article IV(c) is not cognizable under § 2254 when the defendant registered no objection
4 to the trial date at the time it was set, and suffered no prejudice attributable to the delayed
5 commencement”); *Reilly v. Warden*, 947 F.2d 43, 44 (2d Cir.) (holding that violations of
6 the Interstate Agreement on Detainers are not cognizable claims in habeas corpus
7 petitions under 28 U.S.C. §§ 2254 and 2255), *cert. denied*, 502 U.S. 1115, 112 S.Ct.
8 1227, 117 L.Ed.2d 462 (1992); *Keeling v. Varner*, No. 99-CV-6565 (JBW), 2003 WL
9 21919433 at *5 (E.D.N.Y. June 17, 2003) (holding that absent a showing of prejudice,
10 petitioner's claim that his speedy trial rights were violated because he was not tried in
11 accordance with the IAD was not cognizable under federal habeas review) (unpublished),
12 *aff'd*, 142 Fed. Appx. 506 (2d Cir.2005). The Court finds that Veta’s claim is not
13 cognizable on federal habeas review.

14
15 *Speedy Trial Limits, the IAD, and Ineffective Assistance of Counsel*

16 Although the Court has determined that Veta’s claim is not cognizable on habeas
17 review, the Court considers that, pre-*Reed*, the Ninth Circuit determined that the time
18 requirements of the IAD “has its roots in the constitutional provision for speedy trial.”
19 *Carlson v. Hong*, 707 F.2d 367 (9th Cir. 1983) (per curiam). The Ninth Circuit has stated
20 that the failure of a state court to follow the time requirements of the IAD constitutes a
21 violation of federal law for § 2254 purposes. *Cody v. Morris*, 623 F.2d 101 (9th Cir.
22 1980). Because this Court is not aware of any published Ninth Circuit cases addressing
23 this issue post-*Reed*, the Court finds it appropriate to address Veta’s claim.¹

24 As previously stated, Veta asserts that his due process rights were violated when
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26 ¹*See Sun v. Stewart*, 242 F.3d 383 * 1 (9th Cir. 2000) (unpublished) (*citing Reed* for
27 the assertion that “a state court’s failure to observe the time periods of the IAD is not
28 cognizable under § 2254 when defendant ‘registered no objection to the trial date at the time
it was set, and suffered no prejudice attributable to the delayed commencement”).

1 the State of Arizona failed to release him after the speedy trial limits of Ariz.R.Crim.P.
2 8.3(a) and art. IV(c) of the IAD were exceeded. Indeed, Veta asserts that his due process
3 rights were violated when, after an objectively unreasonable determination of waiver, the
4 trial court failed to release him. Veta also asserts that counsel was ineffective in
5 proposing a trial date after the expiration of the speedy trial limits, despite counsel's
6 agreement with Veta not to waive any of his speedy trial rights. Veta asserts that counsel
7 lost Veta his right to dismissal of all charges with prejudice.

8 In addressing the speedy trial issues raised in Veta's appeal of a petition for writ
9 of habeas corpus, the Court of Appeals of Arizona stated:

10 As the trial court correctly noted, Veta's habeas corpus petition was simply a
11 repetition of the arguments he had made in his motion to dismiss. The petition
12 merely reurged his arguments that Rule 8.3(a) and the IAD mandated dismissal of
13 the charges – arguments the trial court had previously rejected. Notably, the same
14 judge who had denied Veta's motions to dismiss also denied his habeas petition.
15 That judge was familiar with the facts and issues raised in both Veta's motions and
16 his petition.

17 * * * * *

18 * * * * *

19 Rule 8.3(a) governs the speedy trial rights of "persons in prison . . . without the
20 state" but charged with crimes in Arizona. That rule provides:

21 Within 90 days after receipt of a written request from any person charged
22 with a crime and incarcerated without the state, or within a reasonable time
23 after otherwise learning of such person's incarceration without the state, the
24 prosecutor shall take action as required by law to obtain such person's
25 presence for trial. Within 90 days after the defendant has been delivered
26 into the temporary custody of the appropriate authority of this state, he or
27 she shall be brought to trial.

28 As the rule's comment makes clear, "violation of [the] time limit[] is ground for
dismissal of the charges with prejudice under Rule 8.6." Rule 8.6 states: "If the
court determines . . . that a time limit established by Rule[] . . . 8.3(a) . . . has been
violated, it shall on motion of the defendant, or on its own initiative, dismiss the
prosecution with or without prejudice."

The IAD is "a compact entered into by 48 States, the United States, and the
District of Columbia to establish procedures for resolution of one State's
outstanding charges against a prisoner of another State." *Hill*, 528 U.S. at 111,
120 S.Ct. at 662, 145 L.Ed.2d at 564. "[T]he IAD is a federal law subject to
federal construction." *Id.* When the charging jurisdiction, pursuant to IAD article
IV(a), requests temporary custody of a prisoner to resolve pending charges against
him or her, "trial shall be commenced within one hundred twenty days of the
arrival of the prisoner in the receiving state." § 31-481, IAD ar. IV(c). If the

1 prisoner is not brought to trial within that time, the IAD requires that the charges
2 be dismissed with prejudice. *Id.*, IAD art. V(c).

3 In *Hill*, as here, defense counsel agreed to a trial date beyond the time required by
4 the IAD. Hill later moved to dismiss, arguing the IAD's time limit had expired.
5 The trial court denied Hill's motion, but the New York Court of Appeals later
6 reversed his convictions and ordered dismissal of the indictment. The Supreme
7 Court reversed and held that defense counsel had effectively waived Hill's speedy
8 trial rights under the IAD.

9 In so holding, the Court first observed "courts have agreed that a defendant may,
10 at least under some circumstances, waive his right to object to a given delay under
11 the IAD." 52 U.S. at 114, 120 S.Ct. at 663, 145 L.Ed.2d at 566. At issue in *Hill*,
12 however, was whether defense counsel's actions could effect such a waiver. In
13 concluding that they could, the Court reasoned, "As to many decisions pertaining
14 to the conduct of the trial, the defendant is 'deemed bound by the acts of his
15 lawyer-agent and is considered to have 'notice of all facts, 'notice of which can
16 be charged upon the attorney.'" *Id.* at 115, 120 S.Ct. at 664, 145 L.Ed.2d at 567,
17 quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 1390, 8
18 L.Ed.2d 734, 740 (1962), quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955,
19 958 (1880). The Court concluded that "[s]cheduling matters are plainly among
20 those for which agreement by counsel generally controls" and that, "[a]bsent a
21 demonstration of ineffectiveness, counsel's word on such matters is the last." *Id.*;
22 cf. *State v. Nelson*, 157 Ariz. 187, 188-89, 755 P.2d 1175, 1176-77 (App. 1988)
23 (defense counsel waived defendant's rights under IAD art. IV(e), the "anti-
24 shuttling" provision).

25 The trial court did not err in ruling, pursuant to *Hill*, that defense counsel had
26 effectively waived Veta's speedy trial rights under the IAD by agreeing to a trial
27 date beyond the IAD's time limit. Similarly, we conclude that defense counsel
28 also could and did waive Veta's speedy trial rights under Rule 8.3(a).

Although the provisions specify different time limits in which an out-of-state
prisoner must be tried – 90 days under Rule 8.3(a), and 120 days under the IAD –
the comment to Rule 8.3(a) states that the rule "is intended primarily to
supplement the provisions of the [IAD]." Further, our supreme court has stated
that "Rule 8.3(a) . . . must be read in light of the [IAD]." *State v. Gretzler*, 126
Ariz. 60, 69, 612 P.2d 1023, 1032 (1980), *overruled in part on other grounds*,
State v. McDaniel, 136 Ariz. 188, 665 P.2d 70 (1983). Accordingly, we fail to see
why an attorney's waiver of the IAD time limit, which the Supreme Court deemed
valid in *Hill*, would not also serve to waive Rule 8.3(a)'s time limit. Cf. *State v.*
Wells, 638 N.W.2d 456, 461 (Minn.Ct.App. 2002) (defense counsel's agreement
to delay omnibus hearing under state law beyond IAD's speedy trial time limit
effectively waived that limit as well).

As noted above, the trial court did not specifically address Veta's Rule 8.3(a)
arguments in its initial ruling denying Veta's motions to dismiss. Because Veta's
attorney effectively waived Rule 8.3(a)'s speedy trial time, however, we find
meritless Veta's argument that the trial court abused its discretion by not expressly
addressing that rule. And, in view of the close relationship between Rule 8.3(a)
and the IAD, that omission did not preclude the trial court from basing its denial
of Veta's habeas corpus petition on the law of the case doctrine.

No other exception to that doctrine applies here. The issues, evidence and
applicable law clearly did not change between the trial court's denial of Veta's

1 motions to dismiss and its denial of his habeas corpus petition. And, the trial
2 court's denial of Veta's motions to dismiss and motion for reconsideration was not
3 "manifestly erroneous or unjust." *Powell-Cerkoney*, 176 Ariz. at 279, 860 P.2d at
4 1332.

5 Finally, although not addressed by the parties, several other grounds support the
6 trial court's ruling. Arizona's rules require defense counsel to "advise the court
7 of the impending expiration of time limits in the defendant's case." Ariz. R. Crim.
8 P. 8.1(d); *see also State v. Guerrero*, 159 Ariz. 568, 570, 769 P.2d 1014, 1016
9 (1989). "Failure to do so . . . should be considered by the court in determining
10 whether to dismiss an action with prejudice pursuant to Rule 8.6." Ariz. R.
11 Crim.P. 8.1(d); *see also State v. Vasko*, 193 Ariz. 142, ¶ 25, 971 P.2d 189, ¶ 25
12 (App. 1998) ("Rule 8 requires a defendant to notify the court of an impending
13 speedy trial deadline in order to preserve his objections to a Rule 8 violation.").

14 Veta failed to comply with the requirement of Rule 8.1(d) before he filed his
15 motions to dismiss for violation of his speedy trial rights. That failure alone could
16 have constituted adequate grounds for rejecting Veta's Rule 8.3(a) argument.
17 Moreover, when the prosecutor sought to accelerate the trial date by a few days,
18 Veta objected to that. And finally, Veta failed to establish that the alleged "speedy
19 trial error in [the underlying] case [would prejudice] his defense in any way or
20 deprive[] him of a fair trial." *Vasko*, 193 Ariz. 142, ¶ 31, 971 P.2d 189, ¶31. For
21 all these reasons, we find no abuse of discretion in the trial court's denial of Veta's
22 habeas corpus petition.

23 Amended Petition, App. I, Court of Appeals' December 5, 2003, Memorandum Decision,
24 pp. 3-9, footnote omitted.

25 In addressing these issues as raised in the Petition for Review of the PCR, the
26 Court of Appeals of Arizona stated:

27 To be entitled to relief based on ineffective assistance of counsel, a defendant must
28 establish that counsel's performance was deficient in that it fell below prevailing
professional norms and that this deficiency was prejudicial. *Strickland v.*
19 *Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); *State v. Nash*, 143
20 Ariz. 392, 397, 694 P.2d 222, 227 (1985). If a defendant fails to make a sufficient
21 showing on either prong of the *Strickland* test, the claim fails. *State v. Salazar*,
22 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985). To avoid summary dismissal of a
petition, a defendant must raise a colorable claim for relief, that is, one "that, if the
allegations are true, might have changed the outcome." *State v. Runningeagle*, 176
Ariz. 59, 63, 859 P.2d 169, 173 (1993).

23 As he does on review, Veta claimed below that trial counsel had been ineffective
24 because he failed to assert Veta's speedy trial rights under Rule 8, Ariz. R. Crim.
25 P., and the Interstate Agreement on Detainers, A.R.S. § 31-481(IAD). Rejecting
26 that claim, the trial court found that Veta had failed to establish counsel's
27 performance had been deficient in this regard or that Veta had been prejudiced in
28 any event. Relying on *New York v. Hill*, 528 U.S. 110, 120 S.Ct. 659 (2000), on
which Veta relied as well, the trial court found Veta was bound by counsel's
agreement that trial could be conducted outside the 180-day period within which
he was required to be tried under article III of the IAD. The court further found
that, even assuming counsel had performed deficiently by agreeing Veta could be
tried more than 180 days after he was transported to this state, Veta was not

1 prejudiced by any such delay.

2 We note at the outset that Veta has not provided us with sufficient information on
3 review to establish that his trial was, in fact, conducted outside the time limit.
4 Moreover, there is vast confusion about which provision of the IAD applied – the
5 180-day time limit of article III(a) or the 120-day limit of article IV(c).¹ In any
6 event, Veta has not sustained his burden on review of establishing that the trial
court abused its discretion when it rejected this claim. We agree with the trial
court that *Hill* defeats rather than supports Veta’s claim and that Veta did not
meaningfully distinguish that case from his. Nor has Veta established that his
rights under the Sixth Amendment were violated.

7 ¹Rule 8.3(a), Ariz. R. Crim. P., provides the following with respect to a
8 person who is outside the state:

9 Within 90 days after receipt of a written request from any person
10 charged with a crime and incarcerated without the state, or within a
11 reasonable time after otherwise learning of such person’s
12 incarceration without the state, the prosecutor shall take action as
required by law to obtain such person’s presence for trial. Within 90
days after the defendant had been delivered into the temporary
custody of the appropriate authority of this state, he or she shall be
brought to trial.

13 Article IV(c) of the IAD provides:

14 In respect of any proceeding made possible by this [a]rticle, trial
15 shall be commenced within one hundred twenty days of the arrival
16 of the prisoner in the receiving state, but for good cause shown in
open court, the prisoner or his counsel being present, the court
having jurisdiction of the matter may grant any necessary or
reasonable continuances.

17 The records shows that in its minute entry of June 28, 2002, the trial court denied
18 Veta’s motion to dismiss the charges based on a violation of the IAD. The court
19 noted that Veta had been indicated in 1996; that a bench warrant had issued,
20 resulting in his extradition from Kentucky pursuant to article IV of the IAD; and
21 that, pursuant to article IV(c) of the IAD, his trial had to be held within 120 days
22 of his arrival in Arizona on February 20, 2002. The trial court further noted, and
23 the records reflects, that, at a pretrial conference on April 19, 2002, the court set
24 the case for trial “at Defendant’s Counsel’s request and in Defendant’s presence,
25 for July 9, 2002.” The court added, “in setting the trial date, neither the Court nor
26 Defense Counsel nor the Deputy County Attorney was aware that the 120-day limit
27 pursuant to [a]rticle IV, rather than the 180-day limit pursuant to [a]rticle III of the
28 IAD was applicable.” The trial court relied on *Hill*, in which the Supreme Court
stated that “scheduling matters are plainly among those for which agreement by
counsel generally controls” and that “[r]equiring express assent from the defendant
himself for such routine and often repetitive scheduling determinations would
consume time to no apparent purpose.” 528 U.S. at 115, 120 S.Ct. at 664. The
trial court also noted Veta had been present when trial was sent and the fact that
he had become “unhappy with what Counsel has done makes it no less binding
upon him.”

Although counsel told the court at the pretrial conference on April 19, 2002, that
Veta was not waiving his speedy trial rights, he and Veta than agreed the case

1 could be set for trial in July, apparently beyond the time allowed under the IAD
2 and Rule 8.3(a). Even assuming as true Veta's assertion that counsel did this as
3 a result of "inexperience, lack of preparation, and ineptitude," the trial court found
4 that he was not thereby prejudiced. Veta does not challenge that finding.
5 Moreover, even if counsel had pointed out to the court the impending deadline, at
6 best, trial would have been set for an earlier date. Nor has Veta established how
7 he was prejudiced by the minimal delay between the 120-day deadline and the July
8 2002 trial date. Indeed, on June 19, 2002, when Larry Rosenthal was permitted to
9 withdraw as counsel for Veta and Chris Kimminau was appointed as advisory
10 counsel upon Veta's request, Veta opposed any acceleration of the trial date.
11 Additionally, the trial court granted numerous continuances on Veta's request, and
12 the trial was not held until April 2004, demonstrating that Veta was not ready for
13 trial in July 2002, much less before then. When trial began, Veta did not raise this
14 issue.

15 And if Rosenthal had pointed out the impending deadline, the trial court could
16 have found "good cause" to set the trial beyond the deadline. *See*, § 31-481, arts.
17 III(a), IV(c). In summary, we agree with the trial court that Veta has not
18 established he was prejudiced, even assuming Rosenthal performed deficiently by
19 not being aware of the IAD deadline and calling it to the attention of the trial court.
20 *Cf. State v. Engram*, 171 Ariz. 363, 368 831 P.2d 366, 367 (App. 1991) (rejecting
21 claim trial counsel had been ineffective in not filing motion to dismiss for violation
22 of Rule 8 because continuances were granted on defendant's request and motion
23 would not have been granted). *See also State v. Parker*, 116 Ariz. 3, 8, 567 P.2d
24 319, 324 (1977) (to determine whether speedy trial rights violated, court must
25 consider length of delay, reasons for delay, defendant's assertion of right, and
26 prejudice).

27 Amended Petition, App. F, Court of Appeals' September 26, 2007, Memorandum
28 Decision, pp. 2-6.² In its decision on Veta's appeal, the Court of Appeals stated:

1 In Veta's case, the only difference between his habeas corpus petition and this
2 appeal was that his trial was significantly delayed, at least partially at Veta's
3 request, for nearly two years beyond the date that he originally claimed violated
4 his speedy trial rights. Because this fact supports our previous finding that Veta
5 had waived his speedy trial rights through his conduct, it would not have changed
6 our decision to deny relief on his petition. Accordingly, that decision is the law
7 of the case and we see no reason to address this issue again. *See [Dancing*
8 *Sunshine Lounge v. Indus. Comm'n*, 149 Ariz. 480, 482, 720 P.2d 81, 83 (1986)].

9 Amended Petition, App. A, Court of Appeals' June 30, 2008, Memorandum Decision, p.
10 4.

11 ²The Court notes that, although the appellate court stated that neither the trial court,
12 defense attorney, nor prosecutor were aware the trial date exceeded the deadlines, Veta
13 asserts that it was the responsibility of Arizona to insure that his trial date was set within the
14 deadlines once Veta invoked his speedy trial rights. Veta's assertion, however, ignores not
15 only *Hill*, but also the requirements of Ariz.R.Crim.P. 8.1(d). Further, in his Traverse, Veta
16 asserts that waiver was the result of fraud because the prosecutor permitted the trial to be set
17 outside the time limits. The Court does not find this conduct constitutes fraud.

1 Construction of the IAD is governed by federal law. *Cuyler v. Adams*, 449 U.S.
2 433, 101 S.Ct. 703, 66 L.Ed.2d 641 (1981). Generally, a state must comply with the
3 IAD's requirements when the state controls the triggering of the IAD by the filing of a
4 detainer (as in art. IV cases). *See, e.g., United States v. Mauro*, 436 U.S. 340, 343–44, 98
5 S.Ct. 1834, 56 L.Ed.2d 329 (1978). The Supreme Court has determined that a defense
6 attorney may effectively waive a defendant's right to be brought to trial within the time
7 periods specified under the IAD by agreeing to a trial date outside of the time period,
8 even without the express consent of the defendant. *Hill*.

9 Veta relies on *United States v. Mezzanatto*, 513 U.S. 196 (1995), for the general
10 proposition that waivers must be voluntary.³ In effect, Veta argues that his invocation of
11 his speedy trial rights shows that he did not voluntarily waive his right to a speedy trial.
12 However, even pre-*Hill*, the Ninth Circuit had determined that a defendant who had
13 invoked the provisions of the IAD could still waive those rights by agreeing to a trial
14 continuance. *See Brown v. Wolff*, 706 F.2d 902 (9th Cir. 1983). Indeed, the state courts
15 all found that Veta was present when counsel suggested a trial date outside the Rule 8 and
16 IAD time limits and Veta has not disputed this finding. In other words, Veta was present
17 during both the invocation and the waiver . . . despite his stated desire to invoke his
18 speedy trial rights, Veta did not demonstrate any objection to the trial date when counsel
19 proposed the trial date.

20

21

23
24 ³Respondents point out that *Mezzanatto* did not discuss waiver of IAD timelines. Veta
25 asserts, however, that *Mezzanatto* sets forth the standard of review for voluntariness of an
26 agreement to waive statutory, non-constitutional rights. The Court notes that the Supreme
27 Court relied on *Mezzanatto* in *Hill* for the assertion that there is a general rule that presumes
28 the availability of a waiver. However, this Court is not aware of any cases that apply
Mezzanatto to an IAD waiver. Nonetheless, because the Court does not find that the record
shows an affirmative indication such that the waiver of the deadlines was involuntary, the
Court need not determine whether *Mezzanatto* is applicable in IAD cases.

1 Moreover, *Mezzanato* does not alter the holding in *Hill* that held that a defense
2 attorney can effectively waive a defendant's speedy trial rights under the IAD. Veta's
3 purported affirmative conduct of asserting his speedy trial rights during the same hearing
4 in which the "untimely" trial date was proposed by the defense, when considered with the
5 facts that the trial court could have scheduled the trial date beyond the deadlines for good
6 cause, Veta did not advise the court of impending violations, Veta requested subsequent
7 continuances, and Veta objected to an accelerated trial date does not establish that the
8 waiver was involuntary.

9 Veta also relies on *People v. Sevigny*, 679 P.2d 1070 (Colo. 1984), *superseded by*
10 *statute*, which held that a voluntary waiver in the context of IAD speedy trial rights
11 "requires a showing of record that the defendant or his attorney freely acquiesced in a
12 trial date beyond the speedy trial period," and that "mere silence, by itself, does not prove
13 a waiver." 679 P.2d at 1075.⁴ In this case, however, Veta and his attorney did not stand
14 silent. Rather, Veta's attorney, in Veta's presence, proposed a trial date outside the Rule
15 8 and IAD time limits. Amended Petition, App. G, p. 2. Although Veta asserts, in his
16 Traverse, that he objected by invoking his speedy trial rights, this fails to take into
17 account that the defense agreed to the trial date *during the same hearing*. Further, Veta
18 does not provide any authority for his implied assertion that Colorado law controls this
19 case.

20 The state appellate court found the trial court did not err in ruling, pursuant to *Hill*,
21 that counsel had waived Veta's speedy trial rights under the IAD by agreeing to a trial
22 date beyond the IAD's time limit. *See State v. Nelson*, 755 P.2d 1175, 1177 (Ariz. App.
23 1988); *State v. Carter*, 729 P.2d 336, 338 (Ariz. App. 1986) (IAD time limitations are for
24 the benefit of the defendant and can be waived). The appellate court also determined that

25
26 ⁴The Court notes that the holding in *Sevigny* has since been superseded by statute in
27 Colorado. *See People v. Newton*, 764 P.2d 1182, 1187 (Colo. 1988) (holding that under an
28 amendment to the relevant state statute, the silence of the defendant or defense counsel in the
setting of an extended trial date waives the speedy trial period under the IAD).

1 counsel could and did waive Veta's speedy trial rights under Rule 8.3(a).

2 Article IV(c) of the IAD specifically provides that "the court having jurisdiction
3 of the matter may grant any necessary or reasonable continuance." The "'necessary or
4 reasonable continuance' provision is, by clear implication, the sole means by which the
5 prosecution can obtain an extension of the time limits over the defendant's objection."
6 *Hill*, 528 U.S. at 116. Moreover, not only does art. III(a) of the IAD permits "good-cause
7 continuances" when either the "prisoner or his counsel" is present, but the Supreme Court
8 held that IAD scheduling decisions may be decided by counsel. *Hill*, 528 U.S. at 115.
9 In this case, the trial court determined that counsel had agreed to a trial date beyond the
10 IAD time limit and that this agreement took place in open court in Veta's presence. The
11 appellate court adopted this determination.⁵ Veta's argument that he is not bound by
12 counsel's agreement to a trial date outside the IAD time limit is contrary to *Hill* in which
13 the Court stated that scheduling matters are among those trial decisions in which a
14 personal waiver by the defendant is not necessary. 528 U.S. at 115. The state courts'
15 determination that Veta's speedy trial rights were waived is consistent with the federal
16 authority.

17 Moreover, as the appellate court pointed out, the trial court could have scheduled
18 the trial date beyond the deadlines for good cause, Veta requested subsequent
19 continuances, and Veta objected to an accelerated trial date. Although Veta disputes the
20 relevance of these finding (e.g., court did not timely consider good cause and subsequent
21 continuances were after expiration of time limit), the Court finds that these were relevant
22 considerations of the state court. *See Reed*, 512 U.S. at 342 (absent allegations of
23 prejudice, IAD violation claims are not cognizable under federal habeas review).

24
25 ⁵The "necessary and reasonable continuance" provision in art. IV(c) "is directed
26 primarily, if not indeed exclusively, to prosecution requests that have not explicitly been
27 agreed to by the defense." *Hill*, 528 U.S. at 115. Because the prosecution was not seeking
28 a continuance over Veta's objection, art. IV(c)'s "necessary and reasonable continuance"
provision is not applicable. *Id.*

1 Additionally, the appellate court determined that Veta did not advise the court of
2 impending violations. Because Veta did not show prejudice, the appellate court denied
3 Veta's claim that counsel was ineffective.⁶

4 This Court does not find that the state court rulings were objectively unreasonable.
5 28 U.S.C. § 2254(d); *Bell v. Cone*, 535 U.S. 685, 698-99, 122 S.Ct. 1843, 1852, 152
6 L.Ed.2d 914 (2002) (habeas court is not to make its own independent judgment, but is to
7 determine whether state court applied federal authority in an objectively unreasonable
8 manner). The Court finds that Veta has failed to show that he is entitled to habeas relief
9 on these claims.

10
11 *Jury Instruction – Hiding*

12 Veta asserts that the trial court erred by giving a jury instruction on the definition
13 of "hiding" because it was unsupported by the evidence. As to this issue, the Court of
14 Appeals of Arizona stated:

15 Veta contends the trial court erred by instructing the jury that it was permitted to
16 consider any evidence of his "hiding" in reaching a verdict. The state responds
17 that sufficient evidence was introduced at trial to support the instruction and it was
properly given.

18 We review a trial court's decision to give a particular instruction for an abuse of
discretion. *State v. Johnson*, 205 Ariz. 413, ¶ 10, 72 P.3d 343, 347 (App. 2003).
19 A trial court may properly give an instruction on any theory that is reasonably
supported by the evidence. *See State v. Cruz*, 189 Ariz. 29, 31, 938 P.2d 78, 80
20 (App. 1996). On appeal, we view the evidence in the light most favorable to
sustaining the decisions below. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d
21 252, 253 (App. 2007). The core of Veta's argument is that there was no evidence

22 ⁶Veta asserts that his ineffective assistance of counsel claim is based on counsel's
23 ignorance of the speedy trial limits and proposing an untimely trial date. Veta asserts that
24 counsel's proposed untimely trial date after invoking Veta's speedy trial rights shows that
25 counsel's conduct was neither strategic nor tactical. However, Veta's argument fails to
26 acknowledge that the trial court could have scheduled the trial date beyond the deadlines for
good cause, Veta did not advise the court of impending violations, Veta requested subsequent
27 continuances, and Veta objected to an accelerated trial date. In effect, Veta asserts that,
because counsel proposed the trial date, Veta lost the right to complain of the delay during
the motion to dismiss hearing. However, this argument fails to acknowledge that other
28 factors could appropriately be considered (e.g., good cause, notice of impending deadline).

1 presented at trial to support the giving of this instruction.²

2 ²In his brief, Veta suggests that, because the facts at trial were not identical
3 to hypothetical evidence the court outlined in ruling on the issue at trial, the
4 evidence was not sufficient. However, as discussed below, this is not the
5 standard of review.

6 The trial court instructed the jury as follow:

7 In determining whether the state has proved the defendant guilty beyond a
8 reasonable doubt, you may consider any evidence of the defendant's hiding,
9 together with all the other evidence in the case. You may also consider the
10 defendant's reasons for hiding. Hiding after a crime has been committed
11 does not by itself prove guilt.

12 If the evidence suggests "the accused attempted to conceal himself," then this type
13 of instruction is proper. *State v. Hunter*, 136 Ariz. 45, 49, 664 P.2d 195, 199
14 (1983). Such an attempt at concealment by the accused "can certainly be read as
15 revealing a consciousness of guilt," and that is the basis for the instruction. *State*
16 *v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992); *see also State v. Noleen*,
17 142 Ariz. 101, 108, 688 P.2d 993, 1000 (1984) (instruction proper when evidence
18 "'support[s] the inference that the accused utilized the element of concealment or
19 attempted concealment'"), *quoting State v. Smith*, 113 Ariz. 298, 300, 552 P.2d
20 1192, 1194 (1976); *State v. Loyd*, 126 Ariz. 364, 367, 616 P.2d 39, 42 (1980) (fact
21 appellant fled state and used different name sufficient to justify flight instruction);
22 *State v. Speers*, 209 Ariz. 125, ¶ 31, 98 P.3d 560, 568 (App. 2004) (evidence must
23 demonstrate defendants' actions made "him harder to find or camouflage[d] his
24 activities" to justify flight instruction).

25 At trial, Terese, the mother of Veta's victims, testified that her eldest son, who was
26 not a victim, had informed Veta about the accusations. After that, Veta called
27 Terese several times, asking each time is she was recording his calls.³ Although
28 Veta initiated the contact with Terese and stated he wanted to see his children, he
refused to tell her where he was. Terese also testified she had not seen Veta again
and he had abandoned "everything" in his trailer, including his clothes, items
borrowed from friends, his birth certificate, and personal photographs, after he
found out about the accusations. The only item Terese could identify that Veta had
apparently taken with him was "a special pillow for his neck."

³Eventually, Veta made incriminating admissions during a call Terese
recorded, an action she testified was prompted by his obvious concern about
whether or not he was being recorded.

Retired Tucson Police Detective Carrillo, who investigated the case in 1996, had
unsuccessfully attempted to locate Veta at the trailer, at the radio station where he
worked, and at his parents' home in Phoenix. Carrillo was never able to find Veta
during his investigation. Gula "Myke" Palmer, Veta's childhood skating coach,
testified she too had attempted to contact Veta during this time, but "couldn't find
him" and had contacted his parents for assistance. Based on this evidence, the jury
reasonably could infer that Veta had absented himself in order to avoid facing the
accusations against him. Because the evidence supported the "hiding" instruction,
the court did not abuse its discretion in giving it. [Footnote omitted.]

Amended Petition, App. A, Court of Appeals' June 30, 2008, Memorandum Decision, pp.

1 4-7.

2 Because the correctness of a jury instruction under state law is not a federal
3 question, the only issue for this Court to determine is whether there is a reasonable
4 likelihood that the jury instruction violated Veta's right to due process. *Estelle v.*
5 *McGuire*, 502 U.S. 62, 71-72 (1991); *see also Prantil v. State of California*, 843 F.2d
6 314, 317 (9th Cir. 1988) (improper jury instruction is basis for habeas relief only if
7 instruction "so infected the entire trial that the resulting conviction violates due process").

8 In Arizona, in determining whether a hiding or flight instruction is appropriate,
9 the evidence is viewed to ascertain whether it supports a reasonable inference that
10 the flight or attempted flight was open, such as the result of an immediate pursuit.
11 If this is not the case then the evidence must support the inference that the accused
12 utilized the element of concealment or attempted concealment. The absence of any
13 evidence supporting either of these findings would mean that the giving of an
14 instruction on flight would be prejudicial error.

15 *State v. Smith*, 552 P.2d 1192, 1194 (Ariz. 1976), *citation omitted*. A court must "be able
16 to reasonably infer from the evidence that the defendant left the scene in a manner which
17 obviously invites suspicion or announces guilt." *State v. Weible*, 688 P.2d 1005, 1008
18 (Ariz. 1984). The Arizona appellate court discussed the evidence from which a jury
19 reasonably could infer that Veta had absented himself in order to avoid facing the
20 accusations against him. In seeking habeas relief, Veta presents and argues conflicting
21 facts and inferences. This does not address whether there was sufficient evidence to
22 warrant the jury instruction; rather such disputes were for the jury to resolve and
23 determine which facts and inferences, if any, to accept. This Court agrees with the state
24 courts that the evidence supported the giving of the "hiding" instruction. The Court finds
25 Veta has not shown that he was denied due process because of the instruction and,
26 therefore, Veta is not entitled to habeas relief on this claim.

27 *Sentencing Enhancement*

28 Veta asserts that his sentence was enhanced in violation of his Sixth and
Fourteenth Amendment rights. Specifically, Veta asserts that he did not receive notice

1 of any dangerous crimes against children (“DCAC”) enhancement in the amended
2 indictment. The Court of Appeals stated:

3 Veta lastly complains he was improperly sentenced under A.R.S. § 13-604.01, the
4 dangerous crimes against children statute, because he “received no notice of any
5 . . . enhancement[] as to the amended indictment.” As noted above, Veta was
6 originally indicted on thirteen counts involving two victims, with an allegation that
7 twelve of those offenses were dangerous crimes against children. Prior to trial, the
8 state moved to amend Veta’s indictment to accommodate changes in its
9 interpretation of A.R.S. § 13-1417, the continuous sexual abuse of a child statute,
10 during the eight years since he had been indicted. This amendment sought to
11 combine the three separate counts of Continuous Sexual Abuse into a single count.
12 The state also sought to dismiss two additional counts of sexual conduct with a
13 minor and one count of molestation based on specific, identifiable occurrences
14 during the same time period, to reflect the state’s determination that the statute was
15 intended “to include all counts of molestation and sexual conduct in one count of
16 continuous sexual abuse” within a specific period of time. *See* A.R.S. § 13-
17 1417(D); *see also State v. Ramsey*, 211 Ariz. 529, ¶ 8, 124 P.3d 756, 760 (App.
18 2005) (“subsection (D) . . . addresses what charges may be brought in a current
19 proceeding involving a charge under § 13-1417”). The trial court granted the
20 state’s motion, finding “[t]he amendment of the Indictment does not operate to
21 change the nature of the offense charged or to prejudice the Defendant.” The court
22 also noted the amendment reduced Veta’s “criminal exposure” and that “[n]o new
23 charges are being added and the Defendant specifically was on notice of all
24 charges set forth in the original Indictment.”

25 In Veta’s original indictment, the state had included a separate allegation of
26 dangerous crimes against children for counts one through twelve. After the
27 amendment, counts one through six of the original indictment had been replaced
28 by an amended count one.⁵ The remaining counts were unchanged. Thus, Veta’s
argument that he lacked notice of the dangerous crimes allegation could only apply
to the amended count. However, the state’s allegation clearly stated “the offenses
of continuous sexual abuse of a child, as charged in Counts One, Two and Four,
. . . are offenses involving a dangerous crime against children.” The amendment
simply merged those three original counts of continuous sexual abuse of a child
into an amended count one. It is therefore clear Veta received notice that he was
being charged with continuous sexual abuse of a child as a dangerous crime
against children, whether it was one count or three.

⁵It appears that no written supervening indictment was filed, although the
amended charges were read to the jury at the beginning of trial.

Moreover, although he was aware of it, Veta did not object to this dangerous
crimes enhancement at trial or at sentencing. During a discussion of potential
lesser-included offenses, Veta’s counsel determined there would have been no
benefit to giving particular lesser-included instructions because those offenses
were “still [dangerous crimes against children]” and Veta would receive no
sentencing benefit if convicted of them. This undercuts Veta’s argument that he
lacked notice of the dangerous crimes against children allegation.

Finally, on each verdict form in which the jury had found Veta guilty, the jury
answered a special interrogatory about the age of the victim. As to the involving
minors in drug offenses count, the jury found the victim had been under the age of
fifteen. Section 13-3409(B), A.R.S., defines that crime and specifically provides

1 that when the minor involved is under fifteen, the offense is punishable under § 13-
2 604.01 as a dangerous crime against children. The jury also specifically found the
3 victim of each count of sexual conduct with a minor was under the age of fifteen.
4 section 13-1405, A.R.S., defines sexual conduct with a minor and states that when
5 the victim is less than fifteen years old, the offense is punishable pursuant to § 13-
6 604.01. The jury additionally found that the victim of the continuous sexual abuse
7 of a child count was under the age of fourteen. However, A.R.S. § 13-1417(B)
8 makes that offense punishable pursuant to § 13-604.01 regardless of the victim's
9 age. Thus, even if Veta's claim that he lacked notice under the amended
10 indictment had any merit, he nevertheless had notice that § 13-604.01 would apply
11 to him because the statute defining the offenses he was charged with provide for
12 sentencing under that statute. *See Raney v. Lindberg*, 206 Ariz. 193, ¶ 6, 76 P.3d
13 867, 870 (App. 2003) ("A charging document provides a defendant with the
14 requisite notice [of the range of potential sentence] by citing the applicable statutes
15 pertaining to the charged crime(s) in compliance with Arizona Rules of Criminal
16 Procedure 13.2(b).").

17 Amended Petition, App. A, Court of Appeals' June 30, 2008, Memorandum Decision, pp.
18 7-10.

19 Sentencing errors that are presented to a state court on direct appeal which claim
20 a violation of state law do not present federal constitutional claims. *See Hendricks v.*
21 *Zenon*, 993 F.2d 664, 674 (9th Cir. 1993) (a state court's refusal to reverse a sentence on
22 state law grounds is not reviewable in federal habeas). Indeed, the Ninth Circuit has
23 refused to consider state law errors in the application of state sentencing law. *Souch v.*
24 *Schaivo*, 289 F.3d 616, 623 (9th Cir. 2002). Moreover, a due process violation based on
25 a misapplication of state law results only if the sentence is arbitrary and capricious.
26 *Richmond v. Lewis*, 506 U.S. 40, 50 (1992). Here, the appellate court found that Veta had
27 notice of the DCAC enhancements, *see State v. Jobe*, 157 Ariz. 328, 757 P.2d 604 (App.
28 1988) (actual notice prior to trial of sentence enhancing allegation ensures a defendant
will not be misled, deceived or surprised), Veta's counsel was aware of the DCAC
allegations when arguing about the lesser included instructions, Veta did not object to the
DCAC enhancement at trial or sentencing, and the statute under which Veta was charged
specifically provided for sentencing pursuant to A.R.S. § 13-604.01 (the DCAC statute).

This Court does not find that the state court rulings were objectively unreasonable.
28 U.S.C. § 2254(d); *Bell v. Cone*, 535 U.S. at 698-99 (habeas court is not to make its
own independent judgment, but is to determine whether state court applied federal

1 authority in an objectively unreasonable manner). The original indictment provided
2 notice of the DCAC enhancement, the Amended Indictment merely combined three
3 separate counts into one count, and Veta did not object to the enhancement at trial or at
4 sentencing. Moreover counsel demonstrated his notice of the enhancement during
5 discussion of potential lesser-included offenses. Lastly, Veta had notice that § 13-604.01
6 would apply to him because the statute defining the offenses he was charged with
7 provides for sentencing under that statute. The Court finds that Veta failed to show that
8 he is entitled to habeas relief on this claim.

9
10 *Certificate of Appealability (“COA”)*

11 Rule 11(a), Rules Governing Section 2254 Cases, requires that in habeas cases the
12 “district court must issue or deny a certificate of appealability when it enters a final order
13 adverse to the applicant.” Such certificates are required in cases concerning detention
14 arising “out of process issued by a State court”, or in a proceeding under 28 U.S.C. §
15 2255 attacking a federal criminal judgment or sentence. 28 U.S.C. § 2253(c)(1). Here,
16 the Petition is brought pursuant to 28 U.S.C. § 2254, and challenges detention pursuant
17 to a State court judgment. This Court must determine, therefore, if a COA shall issue.

18 The standard for issuing a COA is whether the applicant has “made a substantial
19 showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). “Where a district
20 court has rejected the constitutional claims on the merits, the showing required to satisfy
21 § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists
22 would find the district court's assessment of the constitutional claims debatable or
23 wrong.” *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000).
24 “When the district court denies a habeas petition on procedural grounds without reaching
25 the prisoner's underlying constitutional claim, a COA should issue when the prisoner
26 shows, at least, that jurists of reason would find it debatable whether the petition states
27 a valid claim of the denial of a constitutional right and that jurists of reason would find
28 it debatable whether the district court was correct in its procedural ruling.” *Id.* In the

1 certificate, the Court must indicate which specific issues satisfy the showing. *See* 28
2 U.S.C. § 2253(c)(3).

3 The Ninth Circuit has not addressed the effect of *Reed* on *Carlson* and *Cody*. The
4 Court finds that reasonable jurists could find this Court's determination that Veta's IAD
5 claim is not cognizable in a habeas petition is debatable or wrong. Moreover, the Court
6 finds that reasonable jurists could find this Court's determination that Veta's claims that
7 (1) invocation of his speedy trial rights did not make his IAD waiver involuntary and (2)
8 Veta had not shown that he was prejudiced by the alleged deficiency of counsel are
9 debatable or wrong. The Court finds, therefore, that a COA shall issue as to these claims.

10 As to Veta's claims that his rights were violated when (1) the trial court gave a
11 "hiding" instruction unsupported by the evidence and denied Veta a new trial and (2) he
12 was sentenced under A.R.S. § 13-604.01 after receiving no notice of "DCAC"
13 enhancement prior to trial in his Amended Indictment, the Court finds that reasonable
14 jurists would not find this Court's assessment of the constitutional claims debatable or
15 wrong. A COA shall not issue as to these claims.

16 Any further request for a COA must be addressed to the Court of Appeals. *See*
17 Fed. R.App. P. 22(b); Ninth Circuit R. 22-1.

18
19 Accordingly, IT IS ORDERED:

20 1. Veta's Amended Petition under 28 U.S.C. § 2254 for a Writ of Habeas
21 Corpus by a Person in State Custody is DENIED;

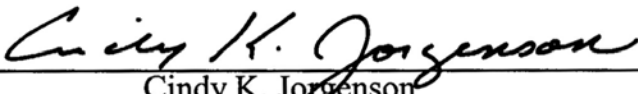
22 2. This matter is DISMISSED with prejudice;

23 3. The Clerk of the Court shall enter judgment and shall then close its file in
24 this matter, and;.

25 4. A Certificate of Appealability shall issue as to Claim 1 (Veta's Fourteenth
26 Amendment Due Process liberty interest right was violated when Arizona failed to release
27 him after time limits of Ariz.R.Crim.P. 8.3(a) and the IAD were exceeded) and Claim 2
28 (Veta's Sixth and Fourteenth Amendment rights to effective assistance of counsel was

1 violated when Rosenthal, despite his agreement with Veta not to waive any of his speedy
2 trial rights and invoking those rights, proposed a time frame outside Veta's time limits,
3 effectively waiving Veta's speedy trial rights).

4 DATED this 1st day of March, 2010.

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8 Cindy K. Jorgenson
9 United States District Judge
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